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Representation by Laymen Held Not to Deprive Accused of Right to Counsel

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ples underlying the date-of-payment rule are actually nothing more than judicially created fictions,[114] the *Bay Ridge* Court's deference to the legislature[115] and concomitant reluctance to repudiate this rule are difficult to justify.[116]

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CRIMINAL PROCEDURE LAW

Representation by layman held not to deprive accused of right to counsel

The right to counsel embodied in the sixth amendment[117] has been interpreted to include the right to effective representation by counsel at trial.[118] While it is clear that incompetent advocacy by a

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[114] *See* note 91 *supra.*

[115] 30 N.Y.2d at 148-49, 282 N.E.2d at 292, 331 N.Y.S.2d at 387.

[116] Professor Occhialino's recognition of the conflict between post-*Dole* third-party practice principles and a date-of-payment accrual led him to propose that *Dole* claims be deemed to accrue when the defendant in the underlying action is served with process. *Contribution, supra* note 91, at 231. This proposal has several practical advantages. For example, all claims arising from a single incident would more likely be tried in one proceeding, thereby minimizing the impact on already crowded dockets and simplifying the apportionment of fault among the parties. *Id.* Where the claimant seeks contribution from the state, of course, adoption of a date-of-service rule would alleviate much of the prejudice to the state resulting from adherence to date-of-payment accrual. *See* note 111 *supra.* Moreover, the tortfeasor served with process would not be placed at a disadvantage, since he will generally be aware at the time of service of any contribution rights he might have against joint tortfeasors. *Contribution, supra* note 91, at 231. Professor Occhialino also suggested a specific 1-year limitation period for *Dole* claims, but acknowledged the "element of arbitrariness" inherent in the choice of time period. *Id.* at 233.

[117] U.S. CONST. amend. VI. As early as 1932, the Supreme Court characterized representation by counsel in capital cases as "vital and imperative." Powell v. Alabama, 287 U.S. 45, 71 (1932). In Betts v. Brady, 316 U.S. 455 (1942), however, the Court stated flatly that "appointment of counsel is not a fundamental right, essential to a fair trial" in all criminal cases. *Id.* at 471. In Gideon v. Wainwright, 372 U.S. 335, 344 (1963) the Court expressly overruled *Betts,* holding that the sixth amendment right to counsel was applicable to state felony proceedings through the fourteenth amendment. Thereafter, the Court extended the right to counsel to all criminal prosecutions involving a potential deprivation of liberty. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972). For a critical analysis of the results of these decisions, see Bazelon, *The Realities of* Gideon *and* Argersinger, 64 GEO. L.J. 811 (1976).

[118] McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970); Reece v. Georgia, 350 U.S. 85, 90 (1955); Powell v. Alabama, 287 U.S. 45, 71 (1932); *see* People v. LaBree, 34 N.Y.2d 257, 313 N.E.2d 730, 357 N.Y.S.2d 412 (1974); People v. Bennett, 29 N.Y.2d 462, 466, 280 N.E.2d 637, 639, 329 N.Y.S.2d 801, 804 (1972). The Supreme Court has declined to establish specific standards for determining whether "effective representation" has been provided. *See* McMann v. Richardson, 397 U.S. 759, 771 (1970). In New York, the courts have utilized the "mockery of justice" test articulated by the Court of Appeals for the District of Columbia Circuit in Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied,* 325 U.S. 889 (1945). Under this test, the defendant has the burden of showing that his attorney made glaring errors that

licensed attorney is not sufficient to satisfy the "effective representation" requirement,[119] it has remained uncertain whether competent representation by an unlicensed practitioner fulfills the constitutional mandate. Recently, in *People v. Felder*,[120] the Appellate Division, Second Department, held that, where the legal services provided were otherwise effective, the fact that a criminal defen-

prejudiced his case. *See, e.g.*, People v. LaBree, 34 N.Y.2d 257, 313 N.E.2d 730, 357 N.Y.S.2d 412 (1974); People v. Bennett, 29 N.Y.2d 462, 280 N.E.2d 637, 329 N.Y.S.2d 801 (1972); People v. Brown, 7 N.Y.2d 359, 361, 165 N.E.2d 557, 558, 197 N.Y.S.2d 705, 707 (1960); People v. Tomaselli, 7 N.Y.2d 350, 354, 165 N.E.2d 551, 553-54, 197 N.Y.S.2d 697, 701 (1960). The "mockery of justice" test has been criticized as "requiring such a minimal level of performance from counsel that it is itself a mockery of the sixth amendment." Bazelon, *The Defective Assistance of Counsel*, 42 U. CINN. L. REV. 1, 28 (1973). In response to such criticism, many courts, including the District of Columbia Circuit, have abandoned the test. *See, e.g.*, Beasley v. United States, 491 F.2d 687 (6th Cir. 1974); United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973). The *DeCoster* court fashioned a new standard based on dictum in *McMann*, wherein the Court suggested that the effectiveness of counsel should be measured by "the range of competence demanded of attorneys in criminal cases." 397 U.S. at 771. Rejecting the argument that the right to effective counsel is grounded in the due process clause rather than in the sixth amendment's " 'more stringent requirements,' " the court stated that "a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate." 487 F.2d at 1202 (quoting Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970) (en banc)) (emphasis omitted). If the defendant establishes that his representative has not met these standards, however, the conviction may nevertheless be upheld if the government proves that the ineffective representation amounted to "harmless error." *Id.* at 1204. For a thorough analysis of the *DeCoster* approach, see Tague, *The Attempt to Improve Criminal Defense Representation*, 15 AMER. CRIM. L. REV. 109 (1977). *See generally* Bazelon, *The Defective Assistance of Counsel*, 42 U. CINN. L. REV. 1 (1973); Bazelon, *The Realities of* Gideon *and* Argersinger, 64 GEO. L.J. 811 (1976); Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973); Gard, *Ineffective Assistance of Counsel—Standards and Remedies*, 41 MO. L. REV. 483 (1976); Note, *Ineffective Representation as a Basis for Relief from Convictions: Principles for Appellate Review*, 13 COLUM. J.L. & SOC. PROB. 1 (1977); Note, 37 OHIO ST. L.J. 927 (1976); Comment, 1976 WASH. U.L.Q. 503.

[119] *See* note 118 and accompanying text *supra*. Although an accused has the right to conduct a *pro se* defense, Faretta v. California, 422 U.S. 806, 812 (1975), it is unclear whether a court may permit a lay person to represent a defendant. In United States v. Grismore, 546 F.2d 844 (10th Cir. 1976), the tenth circuit held that a trial court's refusal to allow a defendant a lay advocate was not unconstitutional, since " '[c]ounsel' as referred to in the Sixth Amendment . . . refers to a person authorized to the practice of law." *Id.* at 847. *See* People v. Cox, 12 Ill. 2d 265, 269, 146 N.E.2d 19, 22 (1957); People v. Washington, 87 Misc. 2d 103, 105, 384 N.Y.S.2d 691, 692 (Sup. Ct. Queens County 1976) (mem.). In dictum, however, the *Grismore* court stated that the trial judge may, in his discretion permit "a lay person to represent a criminal defendant." 546 F.2d at 847 (citing United States v. Jordon, 508 F.2d 750 (7th Cir.), *cert. denied*, 423 U.S. 842 (1975)). *Jordon*, however, is readily distinguishable from *Grismore*, since, before the court approved the layman's presence, the *Jordon* defendant had waived his right to counsel and had proceeded with a *pro se* defense. 508 F.2d at 753. For a common law history describing the evolution of the concept of "counsel", see Turner v. American Bar Ass'n, 407 F. Supp. 451, 472-76 (N.D. Tex. 1975), *aff'd sub nom.* Pilla v. American Bar Ass'n, 542 F.2d 56 (8th Cir. 1976).

[120] 61 App. Div. 2d 309, 402 N.Y.S.2d 411 (2d Dep't 1978), *aff'g* 88 Misc. 2d 196, 387 N.Y.S.2d 531 (Nassau County Ct. 1977).

dant's trial counsel was unlicensed does not require reversal of the conviction.[121]

Felder involved the appeals of three defendants who had been convicted of various felonies.[122] All defendants had been represented by Albert Silver, a unlicensed layman posing as an attorney.[123] Upon learning that their defense had been conducted by a nonprofessional, the defendants, arguing that they had been deprived of the right to effective assistance of counsel,[124] unsuccessfully moved to vacate the convictions.[125] On appeal, the appellate division affirmed

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[121] 61 App. Div. 2d at 314, 402 N.Y.S.2d at 414.

[122] *Id.* at 312-14, 402 N.Y.S.2d at 412-13. Following a jury trial, defendant Felder was convicted of robbery in the first degree and grand larcency in the third degree. Defendants Tucker and Wright, on the advice of Silver, had pleaded guilty to lesser charged crimes.

[123] *Id.* at 315, 402 N.Y.S.2d at 413. Silver had never completed law school or been admitted to practice in any jurisdiction. Despite his lack of professional qualifications, however, Silver had been practicing law in Nassau County for a number of years and was appointed pursuant to article 18-B of the County Law, N.Y. COUNTY LAW §§ 722 to 722-F (McKinney Supp. 1977-1978), to represent two of the three *Felder* defendants. The third defendant in *Felder* had retained Silver privately, without knowing he was unlicensed. 61 App. Div. 2d at 315, 402 N.Y.S.2d at 415 (Hawkins, J., dissenting).

In New York, the unauthorized practice of law is a criminal offense. N.Y. JUD. LAW § 478 (McKinney Supp. 1977-1978). *See also* Note, *The Unauthorized Practice of Law,* 12 SYRACUSE L. REV. 500 (1961).

[124] 61 App. Div. 2d at 311, 402 N.Y.S.2d at 412. The *Felder* defendants sought relief under CPL § 440.10, which is the codification of the common law writ of coram nobis. Coram nobis is a post-judgment remedy which permits the reviewing court to reconsider the verdict and correct any trial errors by vacating the conviction. The writ "has been employed for the purpose . . . of calling up facts unknown at the time of the judgment, facts which affected the validity and regularity of the judgment itself, facts which, if known, would have precluded the judgment rendered." People v. Sullivan, 3 N.Y.2d 196, 199, 144 N.E.2d 6, 9, 165 N.Y.S.2d 6, 10 (1957) (Fuld, J., concurring), *quoted in* 6 ZETT, NEW YORK CRIMINAL PRACTICE ¶ 50.2.5 (1977). *See generally id.* ¶¶ 50.1-.6.

[125] 61 App. Div. 2d at 309, 402 N.Y.S.2d at 412; *see* Harrington v. Martin, 263 App. Div. 922, 32 N.Y.S.2d 406 (3d Dep't 1942) (per curiam). In *Harrington,* the court upheld the defendant's conviction although the individual representing him was not a member of the bar. The *Harrington* court, however, may have been influenced by the defendant's decision to enter a guilty plea pursuant to an independant arrangement with the district attorney. *Id.* at 922, 32 N.Y.S.2d at 407; *see* People v. Felder, 61 App. Div. 2d at 316, 402 N.Y.S.2d at 415. Under these circumstances, the court may have assumed *sub silentio* that the defendant had waived his right to counsel. *See, e.g.,* People v. Cox, 12 Ill.2d 265, 270, 146 N.E.2d 19, 22 (1957). In addition, there were indications in *Harrington* that the "attorney" was at one time a member of the state bar. 263 App. Div. at 922, 32 N.Y.S.2d at 407; *see* People v. Taranow, 28 App. Div. 2d 562, 280 N.Y.S.2d 198 (2d Dep't 1967) (mem.); *cf.* Dunn v. Eichoff, 35 N.Y.2d 698, 699, 319 N.E.2d 709, 709, 361 N.Y.S.2d 348, 348 (1974) (mem.) (civil jury verdict upheld against party represented by disbarred attorney). In his dissenting opinion in *Dunn,* however, Judge Wachtler stated:

> This court should not condone the participation of a disbarred attorney in court proceedings. Our State's policy on this is a firm one, and the Legislature has seen fit to impose penal sanction to deter the practice (Judiciary Law, § 486). This court's interest in maintaining the integrity of the judicial process is more immediate and our response should be more direct.

the lower court's denial of the motions and upheld the convictions.[126]

Justice Titone, writing for the *Felder* majority,[127] acknowledged that the absence of duly licensed counsel at trial "raise[d] an issue of constitutional dimension."[128] He pointed out, however, that the presence of constitutional error does not mandate automatic reversal if the conviction was obtained in a fundamentally fair manner.[129] The court relied primarily on the "harmless constitutional error" doctrine, which was enunciated by the Supreme Court in *Chapman v. California.*[130] The *Chapman* Court stated that the presence of minor constitutional infirmity at trial does not mandate reversal if it is clear, beyond a reasonable doubt, "that the error . . . did not contribute to the verdict . . . ."[131] Reviewing the criminal proceedings at issue in *Felder,* the majority found that each of the three defendants had been represented "ably, diligently, competently and conscientiously" by Silver.[132] Thus, Justice Titone held that Silver's

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Id. at 700, 319 N.E.2d at 710, 361 N.Y.S.2d at 349 (Wachtler, J., dissenting), *quoted in* People v. Felder, 61 App. Div. 2d at 318, 402 N.Y.S.2d at 417 (Hawkins, J., dissenting). Lower courts also have denied coram nobis relief where a defendant was represented by an attorney who had only been admitted to the bar of a foreign jurisdiction. *See, e.g.,* People v. Sardo, 15 Misc. 2d 69, 178 N.Y.S.2d 691 (Monroe County Ct. 1958); People v. Ragni, 159 N.Y.S.2d 358 (Westchester County Ct. 1957).

[126] 61 App. Div. 2d at 314, 402 N.Y.S.2d at 415.

[127] Justice Titone was joined in the majority by Justices Cohalan and Margett. Justice Hawkins wrote a separate opinion in which Presiding Justice Mollen concurred.

[128] 61 App. Div. 2d at 311, 402 N.Y.S.2d at 413.

[129] *Id.* at 311-312, 402 N.Y.S.2d at 413. In reviewing the lower court convictions, the *Felder* court stated:

> The test of due process in such an instance is not whether the defendant had an attorney, licensed or unlicensed, but whether under all of the circumstances his conviction was obtained in such a manner as to be offensive to the common and fundamental idea of what is fair and right . . . .

Id. at 312, 402 N.Y.S.2d at 413 (citing People v. Cornwall, 3 Ill. App. 3d 943, 277 N.E.2d 766 (1971)).

[130] 386 U.S. 18 (1967).

[131] *Id.* at 24. For applications of the *Chapman* standard, see Harrington v. California, 395 U.S. 250 (1969); People v. Almestica, 42 N.Y.2d 222, 366 N.E.2d 799, 397 N.Y.S.2d 709 (1977); People v. Crimmins, 36 N.Y.2d 230, 326 N.E.2d 787, 367 N.Y.S.2d 213 (1975).

[132] 61 App. Div. 2d at 314, 402 N.Y.S.2d at 414. In evaluating the quality of legal assistance provided by Silver, the *Felder* majority emphasized that the two defendants who had entered guilty pleas were given relatively light sentences. These circumstances alone led the court to conclude that these two defendants had been afforded the benefit of "effective representation." Similarly, in the case of the third defendant, the court praised Silver's trial strategy and apparently was influenced by the length of time taken by the jury to reach its decision. *Id.* at 313, 402 N.Y.S.2d at 413. It is submitted that the *Felder* majority's reliance on the outcome of the proceedings as a means of measuring the skill of an unlicensed attorney was misdirected. By focusing on the results of Silver's advocacy, the court necessarily failed to consider what a trained and licensed professional might have accomplished on behalf of his clients. The fallacy in the majority's approach is that it fails to recognize the importance of the numerous, minute decisions that attorneys must make during the course of a trial. It

lack of professional credentials clearly did not contribute to the defendants' convictions[133] and that reversals were therefore not required.[134]

Justice Hawkins, writing for the dissent, took issue with the majority's use of the "harmless error" doctrine.[135] Noting that the doctrine had not been invoked in New York in a case involving unlicensed counsel,[136] Justice Hawkins reasoned that the absence of a duly admitted attorney in *Felder* was a violation of the defendants' sixth amendment rights and required reversal.[137] In the dissent's view, the competence displayed by Mr. Silver was irrelevant, since the right to counsel presupposes representation by an attorney duly admitted to the bar.[138]

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is possible, for example, that an attorney with the requisite training would have moved successfully to suppress damaging evidence and thereby obviated the need for the guilty pleas entered by two of the *Felder* defendants.

The many variables that constitute "competent advocacy" cannot be evaluated effectively at the appellate court level. When the attorney in question has been licensed by the state, the court can rely on a presumption of competence. *See, e.g.*, People v. Brandau, 19 Misc. 2d 477, 480, 189 N.Y.S.2d 818, 822 (Oneida County Ct. 1959) (quoting Feeley v. Ragen, 166 F.2d 976 (7th Cir. 1948)). When the advocate is unlicensed, however, no such presumption is available, and the court is faced with the almost impossible task of "second-guessing" trial counsel's strategy. It is suggested that the uncertainty of this inquiry renders impossible a finding that the defendant's sixth amendment rights were protected "beyond a reasonable doubt."

[133] 61 App. Div. 2d at 314, 402 N.Y.S.2d at 414. *But see* note 132 *supra*.

[134] 61 App. Div. 2d at 314, 402 N.Y.S.2d at 414-15.

[135] 61 App. Div. 2d at 314, 402 N.Y.S.2d at 415 (Hawkins, J., dissenting).

[136] Justice Hawkins noted that the cases relied on by the majority were readily distinguishable from the facts in *Felder*. In Harrington v. Martin, 263 App. Div. 922, 32 N.Y.S.2d 406 (3d Dep't 1942), wherein the court upheld the conviction despite the absence of licensed counsel, the defendant had negotiated a "bargained plea" without consulting his attorney. It was therefore possible to infer that the defendant had waived his right to counsel. Moreover, it was not absolutely clear that the advocate in *Harrington* had never been licensed. Most significantly, *Harrington* was decided before the sixth amendment had been applied to the states in the landmark decision of Gideon v. Wainwright, 372 U.S. 335 (1963). *See* note 117 *supra*. Similarly, in People v. Cornwall, 3 Ill. App. 3d 943, 277 N.E.2d 766 (1971), the attorney in question was not totally without credentials, since he had been admitted to practice in another state. Justice Hawkins further observed that Dunn v. Eickhoff, 43 App. Div. 2d 580, 349 N.Y.S.2d 414 (2d Dep't 1973), *aff'd mem.*, 35 N.Y.2d 698, 319 N.E.2d 709, 361 N.Y.S.2d 348 (1974), was also inapposite since it involved a civil action in which the plaintiffs failed to inform the court that their attorney had been disbarred. 61 App. Div. 2d at 314-19, 402 N.Y.S.2d at 415-17 (Hawkins, J., dissenting). In support of its position, the dissent discussed People v. Washington, 87 Misc. 2d 103, 384 N.Y.S.2d 691 (Sup. Ct. Queens County 1976), a case involving another defendant who had been represented by Silver. There, the court held that "[a] defendant's constitutional right can only be satisfied by a lawyer admitted to practice before the court." *Id.* at 105, 384 N.Y.S.2d at 692. The conviction in *Washington* was reversed.

[137] 61 App. Div. 2d at 318, 402 N.Y.S.2d at 417 (Hawkins, J., dissenting).

[138] *Id.* at 315, 402 N.Y.S.2d at 415 (Hawkins, J., dissenting). The dissent also noted that a rule requiring reversal whenever a convicted defendant was represented by an unlicensed

The decision in *Felder* appears to represent a serious misapplication of the "harmless constitutional error" doctrine. Having found at the outset that the absence of licensed counsel raised a constitutional problem, the *Felder* court was obliged to apply the "harmless beyond a reasonable doubt" standard articulated in *Chapman.*[139] It is submitted that the same fact which led the court to a finding of constitutional error, representation by a layman, was alone sufficient to raise a reasonable doubt as to whether the error was harmless.[140] Only by applying the less stringent "fundamental fairness" standard implicit in the fourteenth amendment due process clause could the court reasonably conclude that the defendants' rights had been adequately protected at trial.[141] Although this less demanding test has been used in New York to determine in the first instance, whether a constitutional error has been committed, it has not been applied to establish that an acknowledged constitutional defect was merely "harmless error."[142] It is suggested that the better rule would be to treat the lack of licensed trial counsel as a *per se* violation of the sixth amendment warranting automatic reversal.[143] Such a rule would preclude a case-by-case evaluation of the quality of an unlicensed practitioner's advocacy[144] and would be consistent with the reasonable doubt standard established in *Chapman.*

The *Felder* majority has extended the harmless constitutional error rule well beyond the doctrine's previously accepted boundaries.[145] By holding that the absence of qualified trial counsel can be "harmless error," the court has placed the critically important sixth amendment right to counsel in serious jeopardy.[146] It is hoped that

practitioner "could well open a Pandora's box." *Id.* at 318, 402 N.Y.S.2d at 417 (Hawkins, J., dissenting). Justice Hawkins reasoned, however, that the ensuing legal problems could be handled by the courts on a case-by-case basis, in much the same manner as the courts handled the complex legal issues spawned by the landmark decisions in Miranda v. Arizona, 384 U.S. 436 (1966), and Gideon v. Wainwright, 372 U.S. 335 (1963). 61 App. Div. 2d at 318, 402 N.Y.S.2d at 417 (Hawkins, J., dissenting).

[139] *See* text accompanying notes 130 & 132 *supra.*

[140] *See* note 131 *supra.*

[141] *See* note 129 *supra.*

[142] *See* note 136 *supra.*

[143] Treating the absence of licensed counsel as reversible error *per se* would not necessarily require reversal in instances where the defendant knowingly employs unlicensed counsel and subsequently appeals an unfavorable decision on this ground. In such cases, the defendant may be deemed to have waived his right to licensed counsel.

[144] *See* note 137 *supra.*

[145] *See* note 146 *infra.*

[146] It is suggested that the "harmless constitutional error" doctrine should not be applied in cases such as *Felder* where the acknowledged constitutional error involved the conduct of the entire trial. The harmless error doctrine originally arose out of the recognition that certain errors committed at the trial level, while technically violative of the Constitution, may be

the Court of Appeals will review the "harmless constitutional error" doctrine at the earliest possible opportunity and establish clear and narrowly drawn guidelines for its use. In the absence of such guidelines, the potential for this doctrine's abuse will remain a serious threat to the carefully constructed rights of criminal defendants.[147]

Gregory Kehoe

ESTATES, POWERS, AND TRUSTS LAW

EPTL § 5-4.3: Recovery permitted for loss of consortium in wrongful death action

Section 5-4.3 of the EPTL[148] permits recovery in a wrongful death action[149] "for pecuniary injuries resulting from the decedent's

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disregarded if they did not contribute to the defendant's conviction. Thus, in *Chapman*, the Supreme Court stated that "some constitutional errors . . . are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." 386 U.S. at 22. Typically, the error consists of the erroneous admission of physical or testimonial evidence in violation of the defendant's fourth, sixth, or fourteenth amendment rights. *E.g.*, People v. Smith, 60 App. Div. 2d 566, 401 N.Y.S.2d 353 (4th Dep't 1978); People v. Trappier, 60 App. Div. 2d 896, 401 N.Y.S.2d 295 (2d Dep't 1978); People v. Cowan, 60 App. Div. 2d 634, 400 N.Y.S.2d 179 (2d Dep't 1977). In such cases, before the error can be held to have been harmless, the court must examine the admissible and inadmissible evidence presented by the prosecution and conclude that the erroneously admitted evidence did not, in any way, contribute to the conviction. *See* People v. Jones, 61 App. Div. 2d 264, 402 N.Y.S.2d 28 (2d Dep't 1978). In essence, the appellate court must decide whether the decision at the trial level would have been the same had the evidence been excluded from consideration. In a case such as *Felder*, however, the question does not call for a weighing of the relative impact of evidence. Rather, in order to hold the error harmless, the court would have to conclude that representation by the layman did not contribute to the defendant's conviction. It is submitted that the harmless error test was not meant to permit the court to make such a subjective determination, nor is it precise enough to properly evaluate the impact of a sixth amendment violation which is present at every stage of the trial.

[147] *See* note 146 *supra*.

[148] EPTL § 5-4.3 provides in part:

> Amount of recovery.
>
> The damages awarded to the plaintiff may be such sum as the jury or, where issues of fact are tried without a jury, the court or referee deems to be fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought.

EPTL § 5-4.3.

[149] The cause of action for wrongful death was unknown at common law. Sea-Land Serv., Inc. v. Gaudet, 414 U.S. 573, 579 (1974); Western Union Tel. Co. v. Cochran, 277 App. Div. 625, 630, *aff'd*, 302 N.Y. 545 (1951). Believing there was no valid justification for permitting recovery for personal injuries in a negligence suit and denying such recovery in the event that the personal injuries resulted in death, the English Parliament enacted The Fatal Accidents Act, 1846, St. 8 & 10 Vict., c. 93. *In re* Meng, 96 Misc. 126, 128, 159 N.Y.S. 535; 537 (Sur. Ct. N.Y. County 1916), *aff'd*, 188 App. Div. 69, 176 N.Y.S. 290 (1st Dep't 1919), *rev'd mem.*